

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	No. 02-20332-M1/V
)	
MELTON DEAN HENNINGS,)	
)	
Defendant.)	

REPORT AND RECOMMENDATION
ON DEFENDANT'S PRETRIAL MOTIONS

Before the court are the following motions filed by the defendant, Melton Dean Hennings, on December 17, 2002:

1. Motion to Require the Government to Produce *Jencks*, *Brady*, and *Giglio* Material and to Comply with Rule 26.2 of the Federal Rules of Criminal Procedure;
2. Motion for Disclosure of Promises, Etc. to Government Witnesses;
3. Motion for the Government to Give Notice of its Intention to use Evidence of Other Crimes, Wrongs, or Bad Acts under Fed. R. Evid. 404(b);
4. Motion for Disclosure of Expert Witness Testimony Pursuant to Fed. Crim. Rule 16(a)(1)(E);
5. Motion to Reveal Identity of Informants;
6. Motion in Limine (a motion to exclude "tip" testimony);
7. Motion for Bill of Particulars; and
8. Motion to Allow Time for Filing of Any Additional

Motions.

All the motions were referred to the United States Magistrate Judge for reports and recommendations. The government filed a consolidated response on December 23, 2002. For the following reasons, it is recommended that all motions be denied.

BACKGROUND

On September 12, 2002, the grand jury returned a fifteen count indictment against the defendant, Melton Hennings. The indictment included ten counts of possession of cocaine base; three counts of being a felon in possession of a firearm; one count of possessing an illegal firearm; and one count of controlling property used for the distribution of cocaine.

PROPOSED CONCLUSIONS OF LAW

- A. Motion to Require the Government to Produce *Jencks*, *Brady*, and *Giglio* Material and to Comply with Rule 26.2 of the Federal Rules of Criminal Procedure;

Motion for Disclosure of Promises, Etc. to Government Witnesses;

Motion for the Government to Give Notice of its Intention to Use Evidence of Other Crimes, Wrongs, or Bad Acts under Fed. R. Evid. 404(b);

Motion for Disclosure of Expert Witness Testimony Pursuant to Fed. Crim. Rule 16(a)(1)(E)

The defendant's first four motions seek broad pretrial

discovery from the government.¹ Defendant claims the right to this discovery in reliance on *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and *Roviaro v. United States*, 353 U.S. 53 (1957) and their progeny, Rule 26.2 of the Federal Rules of Criminal Procedure, and the Jencks Act. The government indicates that it presently is unaware of any exculpatory evidence, and that it presently is unaware of any 404(b) evidence in relation to its case in chief. (Government's Consolidated Resp. to Def. Hennings's Pre-Trial Mots. at 2-3.) In addition, the government voluntarily has supplied expert witness information in its responsive filing. (*Id.* at 5-6.)

"There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Similarly, neither *Brady* nor *Giglio* created in defendants a right to broad pretrial discovery of impeachment or bias evidence. *United States v. Presser*, 844 F.2d 1275, 1282-84 (6th Cir. 1988).

Rule 16 of the Federal Rules of Criminal Procedure which

¹ These four motions are duplicative of the defendant's letter request for discovery filed September 26, 2002. The government responded to the defendant's letter request for discovery on October 26, 2002, in compliance with its obligations under Local Criminal Rule 15.1 and Rule 16 of the Federal Rules of Criminal Procedure. Therefore, these motions were unnecessary.

governs pretrial discovery in criminal matters specifically provides that the rule does not "authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. 3500." F.R.Crim.P. 16(a)(3). The Jencks Act, 18 U.S. C. § 3500, requires production of a witness statement after the witness has testified on direct examination. Rule 26.2 likewise requires production of witness statements only after a witness has testified. The defendant here seeks production of the government's witnesses' statements in advance of trial. A court cannot compel earlier production of the witness statements, *United States v. Farley*, 2 F.3d 645 (6th Cir. 1993), although the court does encourage such early production when feasible.

Therefore, it is submitted that these four motions should be denied.

B. Motion to Reveal Identity of Informants

In determining whether the identity of an informant is subject to disclosure, a court must balance the defendant's need for disclosure to ensure a fair trial against the public interest in preserving informant anonymity and encouraging citizens to report crimes. *Roviaro*, 353 U.S. at 59. It is well-established, however, that a defendant is not entitled to know in advance of trial who will testify for the government. *United States v. McCullah*, 745

F.2d 350, 353 (6th Cir. 1984). In addition, the burden is on the defendant "to show how disclosure of the informant would substantively assist his defense." *United States v. Moore*, 954 F.2d 379, 381 (6th Cir. 1992). Here, the defendant's motion reflects only a generalized desire to know the identity of all informants before trial. The defendant has failed to make the requisite showing of need for disclosure of an informant's identity, at trial or otherwise. Therefore, it is submitted that this motion should be denied.

C. Motion in Limine [Motion to Exclude "Tip" Testimony]

The defendant's motion in limine asks the court to exclude all evidence pertaining to "receipt of [a government informant's] 'tip', the contents of the 'tip', any reliance on the 'tip' or any action taken pursuant to the 'tip'." (Mot. in Limine at 4.) In support of his motion, the defendant cites the Fifth and Sixth Amendments to the United States Constitution and Federal Rules of Evidence Nos. 801 (defining hearsay) and 802 (excluding hearsay).²

The question of whether a statement is hearsay depends in part on the purpose for which it is proffered. At that time, the inquiry usually is whether the statement is proffered to prove the

² Defendant also cites to Federal Rules of Evidence Nos. 401 (defining relevant evidence) and 403 (excluding certain relevant evidence) but does not develop an argument based on these rules.

truth of the matter asserted. See FED. R. EVID. 801 (defining hearsay). The government asks the court to hold in abeyance any admissibility ruling until it is apparent that the informant's 'tip' will be part of the government's evidence and that its admissibility will be at issue. This court agrees that this is the more efficient course of action and accordingly recommends that the defendant's motion be denied without prejudice at this time, subject to renewal at trial if appropriate.

D. Motion for Bill of Particulars

_____The defendant seeks a bill of particulars, alleging that Count Fifteen of his indictment fails to describe how he violated 21 U.S.C. § 856. The count reads as follows:

COUNT FIFTEEN

On or about August 29, 2000 to on or about December 29, 2000, in the Western District of Tennessee, the defendant, MELTON DEAN HENNINGS, did unlawfully, knowingly and intentionally manage and control property containing buildings and enclosures, specifically 3951 Charleston Road, Mason, Tennessee, as an owner, and made available for use, with or without compensation, said building for the purpose of unlawfully distributing controlled substances, specifically cocaine, a controlled substance as classified by Title 21, United States Code, Section 813 as a Schedule II controlled substance, in violation of Title 21, United States Code, Section 856.

(Indictment, *United States v. Hennings*, Crim. Case No. 02-20332 (W.D. Tenn. Sept. 12, 1992).) The defendant also complains that Count 15 is overbroad and alludes to conduct allegedly committed by

persons other than the defendant.

The decision to order a bill of particulars is within the sound discretion of the trial court. *United States v. Salisbury*, 983 F.2d 1369, 1375 (6th Cir. 1993). The purposes of a bill of particulars are "to inform the defendant of the nature of the charge against him with sufficient precision to enable him to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable him to plead [double jeopardy] when the indictment itself is too vague, and indefinite for such a purpose." *United States v. Birmley*, 529 F.2d 103, 108 (6th Cir. 1976). However, a bill of particulars is not meant as "a tool for the defense to obtain detailed disclosure of all evidence held by the government before trial." *Salisbury*, 983 F.2d at 1375.

The source of the defendant's confusion over the provisions of 21 U.S.C. § 856 is unclear. The code provision reads, in pertinent part, as follows:

Except as authorized by this subchapter, it shall be unlawful to (1) knowingly open or maintain any place for the purpose of manufacturing, distributing, or using any controlled substance; (2) manage or control any building, room, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, and knowingly and intentionally rent, lease, or make available for use, with or without compensation, the building, room, or enclosure for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

21 U.S.C. § 856(a). The indictment's allegations of time and place

give the defendant sufficient notice to prepare a defense to a charge that, during the months specified, he owned certain property and knew that the property was being used in association with illegal drug trafficking. An order for a bill of particulars that provides information about the *manner* in which the violation occurred would impermissibly demand evidentiary detail and unduly intrude upon the government's theories. See *United States v. Andrews*, 381 F.2d 377, 378 (2d Cir. 1967); *United States v. Kelly*, 120 F.R.D. 103, 107-08 (E.D. Wis. 1988). Accordingly, it is recommended that this motion should be denied.

E. Motion for Extension of Time

The defendant submits that his attorney is still investigating the case and seeks the court's leave to file "additional motions if it is determined that any are necessary in order to protect the Defendant's rights." (Def.'s Mot. to Allow Time for Filing of Any Additional Motions at 1.) In the interest of judicial economy, in light of the many trial date continuances already entered, and in light of the fact that the seven pretrial motions discussed in the instant recommendation present no close questions of law, additional motions should be permitted, if at all, only on a case-by-case basis for good cause shown. Accordingly, it is submitted that this motion seeking "blanket permission" should be denied.

RECOMMENDED DISPOSITION

For the foregoing reasons, it is recommended that the defendant's Motion to Require the Government to Produce *Jencks*, *Brady*, and *Giglio* Material and to Comply with Rule 26.2 of the Federal Rules of Criminal Procedure; Motion for Disclosure of Promises, Etc. to Government Witnesses; Motion for the Government to Give Notice of its Intention to use Evidence of Other Crimes, Wrongs, or Bad Acts under Fed. R. Evid. 404(b); Motion for Disclosure of Expert Witness Testimony Pursuant to Fed. Crim. Rule 16(a)(1)(E); Motion to Reveal Identity of Informants; Motion for Bill of Particulars; and Motion to Allow Time for Filing of Any Additional Motions should all be denied. It is also recommended that the defendant's Motion in Limine to exclude informant "tip" testimony be denied, but without prejudice. The government is reminded of, and has recognized, its obligations under *Brady* and *Giglio* to produce at trial all evidence that is materially favorable to the defendant.

Respectfully submitted this 11th day of February, 2003.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.